SEE TEOW CHUAN & ANOR A

v.

YAM TUNKU NADZARUDDIN IBNI TUANKU JAAFAR & ORS B

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
ZULKEFLI MAKINUDIN JCA
RAUS SHARIF JCA
[CIVIL APPEAL NO: B-02-185-2004] C
18 DECEMBER 2006

CONTRACT: *Specific performance - Contract of service - Specific relief amounting to reinstatement - Resolution passed requiring all executive directors to retire on attaining 55 years of age - Terms of contract - Whether resolution tainted with bad faith - Retrospective effect - Unilateral introduction of a new term into contract - Whether injunction restraining implementation of said resolution a decree of specific performance - Whether declaration that plaintiffs entitled to continue as directors amounted to specific performance of service contract* D E

COMPANY LAW: *Directors - Removal - Specific relief amounting to reinstatement - Resolution passed requiring all executive directors to retire on attaining 55 years of age - Terms of contract - Whether resolution tainted with bad faith - Retrospective effect - Unilateral introduction of a new term into contract - Whether injunction restraining implementation of said resolution a decree of specific performance - Whether declaration that plaintiffs entitled to continue as directors amounted to specific performance of service contract* F

This appeal was directed against the order of the High Court dismissing the plaintiffs' claim against the defendants for specific relief amounting to reinstatement in office. The fifth defendant was a public-listed company and the other defendants were members of the fifth defendant's board of directors. The plaintiffs, who were brothers, were at all material times directors and substantial shareholders of the fifth defendant. Their service contracts with the fifth defendant had three salient and relevant features. First, neither was in writing. Second, neither contained an express term imposing a retirement age for the plaintiffs. Third, there was no article in the memorandum and articles of association of the fifth G H I

A defendant specifying a retirement age for either plaintiff. The present dispute manifested itself in consequence of a decision of the fifth defendant's board taken on 31 March 1999 resolving that all executive directors must retire on attaining 55 years of age. That decision was conveyed to the first plaintiff by a letter dated
B 26 April 1999 informing him that he was required to retire as the managing director of the fifth defendant's group of companies with effect from 31 May 1999. The plaintiffs brought an action challenging the introduction of a new term into their existing contract that they should retire. In his pleaded case, the first
C plaintiff asserted that it was an implied term of his appointment as managing director of the fifth defendant that he would remain as managing director for as long as he was willing and able to do so. The High Court dismissed the claim of both plaintiffs. The main issue in this case was whether the fifth defendant by its board
D resolution of 31 March 1999 could require the first plaintiff to retire on the ground that he had already attained 55 years of age, an event that took place some three years earlier.

Held (allowing the appeal and setting aside the orders of the
E **High Court)**
Per Gopal Sri Ram JCA:

(1) The contentious issue should be resolved in the first plaintiff's favour for the following reasons: (i) it was neither
F an express nor an implied term of the first plaintiff's contract with the fifth defendant that he should retire on attaining 55 years of age; (ii) it was plainly a term of the first plaintiff's contract that he should serve as managing director for as long as he was willing and able to perform his duties, which
G was why he was permitted without any protest from any quarter to continue to serve as managing director even after he had attained 55 years of age; (iii) there was material on record to reasonably support the inference that the resolution of 31 March 1999 was the product of a design
H by the second defendant and those members of the board aligned to him to have the plaintiffs removed as managing director and executive director respectively. So much of the resolution as was directed at retiring the plaintiffs (in particular the first plaintiff) was therefore tainted with bad
I faith evidenced by the bitter family feud between the plaintiffs and the second defendant. The power to pass the

resolution as to the retirement of directors was used by the defendants for a collateral or improper purpose, namely, to remove the first plaintiff and was to that extent invalid; and (iv) the resolution could not, as a matter of law, have retrospective effect so as to compel the plaintiffs to retire (*Guest, Keen, Williams Private Ltd v. P J Sterling* (foll)). Furthermore, an attempt by a party to a contract to unilaterally introduce a new term into it was regarded as a breach of contract because it amounts to "an intimation of an intention to abandon and altogether to refuse performance of the contract" as it stands (*Freeth v. Burr* (foll)). This was precisely the situation in the present case. (paras 6 & 7)

(1a) The learned judge in the court below ought to have held for the plaintiffs by making a finding that so much of the resolution of 31 March 1999 resolving that all executive directors must retire on attaining 55 years of age did not apply to the plaintiffs. Thus, there was no difficulty in the grant of an injunction restraining the defendants from implementing the resolution of 31 March 1999 insofar that it imposed the retirement age of 55 years upon the plaintiffs. (para 8)

(2) An injunction restraining the implementation of the resolution of 31 March 1999 imposing a retirement age of 55 years upon the plaintiffs was not a decree of specific performance. It merely prevented so much of that resolution which required executive directors to retire upon attaining 55 years of age from being applied to the plaintiffs. This was not a case of termination or removal from office under s. 128 of the Companies Act 1965 but one in which a retirement age was being imposed by way of a board resolution. There was a world of difference between retirement from office and termination from employment. What happened here was the unilateral imposition of a retirement age of 55 years by way of a board resolution after the first plaintiff had already crossed that age about three years earlier. That resolution could not be made to apply to the plaintiffs. (paras 16, 17 & 18)

(2a) Likewise, a declaration that, in accordance with the defendant's Human Resource Package, the plaintiffs were entitled to continue as managing director and executive director respectively without a retirement age and were entitled to continue to enjoy the said benefit on a personal to holder basis until they attained 70 years of age, did not amount to the specific performance of a service contract. This was because the defendants were merely required to adhere to that part of the board resolution that introduced the Human Resource Package. (para 19)

[Order accordingly.]

Bahasa Malaysia *translation of headnotes*

Ini adalah rayuan perayu terhadap keputusan Mahkamah Tinggi kerana menolak tuntuan plaintif untuk relif spesifik pengambilan semula ke jawatan asal. Defendan kelima adalah sebuah syarikat awam tersenarai sementara defendan-defendan lain adalah ahli-ahli lembaga pengarah defendan kelima. Plaintif-plaintif, yang merupakan adik beradik, adalah pengarah-pengarah dan pemegang saham besar defendan kelima. Kontrak perkhidmatan plaintif-plaintif dengan defendan kelima memperlihatkan tiga ciri penting dan relevan. Pertama, ianya tidak bertulis. Kedua, ia tidak mengandungi terma jelas mengenai umur persaraan plaintif-plaintif. Ketiga, tidak ada peruntukan di dalam artikel dan memorandum persatuan defendan kelima menghadkan umur bersara plaintif-plaintif. Pertikaian di sini berpunca dari keputusan lembaga pengarah defendan kelima yang dibuat pada 31 Mac 1999 yang memutuskan bahawa semua pengarah eksekutif hendaklah bersara apabila mencapai umur 55 tahun. Keputusan tersebut telah diserahkan kepada plaintif pertama melalui surat bertarikh 26 April 1999 memberitahunya bahawa beliau dikehendaki bersara sebagai pengarah urusan kumpulan syarikat defendan kelima mulai 31 Mei 1999. Plaintif-plaintif memulakan tindakan bagi mencabar kemasukan terma baru ke dalam kontrak perkhidmatan sedia ada mereka. Dalam kes yang diplidkan, plaintif pertama menekankan bahawa adalah menjadi terma tersirat perlantikannya sebagai pengarah urusan defendan kelima bahawa beliau akan kekal menjadi pengarah urusan selagi masih bersedia dan mampu menjalankan tugasnya. Mahkamah Tinggi menolak tuntutan kedua-dua plaintif. Isu utama yang berbangkit adalah sama ada defendan kelima, melalui resolusi

lembaga pengarahnya pada 31 Mac 1999, boleh mengkehendaki plaintif pertama bersara dengan alasan beliau telah mencapai usia 55 tahun, di mana usia tersebut telah dicapai oleh plaintif pertama kira-kira tiga tahun sebelum itu.

Diputuskan (membenarkan rayuan dan mengenepikan perintah Mahkamah Tinggi)
Oleh Gopal Sri Ram HMR:

(1) Isu yang menjadi pertikaian harus diputuskan dengan memihak kepada plaintif-plaintif atas alasan-alasan berikut: (i) bukanlah menjadi terma jelas atau tersirat kontrak perkhidmatan plaintif pertama dengan defendan kelima bahawa beliau harus bersara pada usia 55 tahun; (ii) adalah jelas bahawa satu terma kontrak perkhidmatan plaintif pertama adalah bahawa beliau harus meneruskan khidmatnya sebagai pengarah urusan selama mana beliau mampu dan bersedia menjalankan tugas tersebut, dan inilah sebabnya mengapa beliau dibenarkan terus berkhidmat sebagai pengarah urusan selepas mencapai usia 55 tahun tanpa apa-apa bantahan dari mana-mana pihak; (iii) terdapat material pada rekod yang menyokong inferens bahawa resolusi 31 Mac 1999 adalah angkara defendan kedua dan ahli-ahli lembaga pengarah lain yang menyebelahinya untuk menyingkir plaintif-plaintif sebagai pengarah urusan dan pengarah eksekutif defendan kelima. Oleh itu, resolusi yang berkaitan dengan percubaan untuk membersarakan plaintif-plaintif (terutama plaintif pertama) telah dikotori niat jahat seperti yang terlihat dari permusuhan keluarga yang berlaku di antara plaintif-plaintif dan defendan kedua. Kuasa untuk meluluskan resolusi mengenai persaraan pengarah-pengarah telah diguna oleh defendan-defendan untuk maksud kolateral dan tidak baik, yakni untuk menyingkir plaintif pertama dan dengan itu adalah tak sah; dan (iv) resolusi, sebagai suatu perkara undang-undang, tidak boleh mempunyai kesan kebelakangan bagi memaksa plaintif-plaintif untuk bersara (*Guest, Keen, Williams Private Ltd v. P J Sterling* (diikuti)). Selain itu, sebarang percubaan sebelah pihak oleh suatu pihak kepada kontrak untuk memasukkan terma baru adalah dianggap sebagai pelanggaran kontrak, kerana ia samalah seperti "berhasrat untuk meninggalkan dan samasekali enggan melaksanakan kontrak" yang sedia wujud (*Freeth v. Burr* (diikuti)). Inilah yang berlaku dalam kes di sini.

(1a) Yang arif hakim mahkamah di bawah sepatutnya membuat keputusan yang berpihak kepada plaintif-plaintif dengan membuat dapatan bahawa bahagian resolusi 31 Mac 1999 yang memutuskan bahawa semua pengarah hendaklah bersara pada usia 55 tahun adalah tidak terpakai kepada plaintif-plaintif. Dengan itu, tidak timbul masaalah mengeluarkan injunksi bagi menghalang defendan-defendan dari melaksanakan resolusi 31 Mac 1999 setakat mana ianya menghadkan umur 55 tahun sebagai umur persaraan plaintif-plaintif.

(2) Suatu injunksi yang menghalang pelaksanaan resolusi 31 Mac 1999 yang menghadkan 55 tahun sebagai umur persaraan terhadap plaintif-plaintif bukan satu dekri pelaksanaan spesifik. Ia hanya menghalang bahagian resolusi yang mengkehendaki pengarah-pengarah eksekutif bersara pada umur 55 tahun dari dipakai kepada plaintif-plaintif. Ini bukanlah kes pembuangan kerja atau penamatan jawatan di bawah s. 128 Akta Syarikat 1965 tetapi adalah satu kes di mana umur persaraan hendak dipaksakan dengan berlandaskan kepada resolusi lembaga pengarah. Terdapat perbezaan yang ketara antara persaraan dari jawatan dan penamatan pekerjaan. Apa yang berlaku di sini adalah pengenaan umur persaraan 55 tahun secara sebelah pihak melalui resolusi lembaga pengarah setelah plaintif pertama telahpun mencapai had umur tersebut kira-kira tiga tahun sebelumnya. Resolusi sedemikian tidak boleh dipakai kepada plaintif-plaintif.

(2a) Begitu juga, satu deklarasi bahawa di bawah Pakej Sumber Manusia plaintif-plaintif berhak untuk meneruskan tugas sebagai pengarah urusan dan pengarah eksekutif masing-masingnya tanpa terikat kepada usia persaraan dan boleh menikmati manfaat tersebut sebagai hak peribadi masing-masing sehingga berusia 70 tahun, bukanlah suatu pelaksanaan spesifik kontrak perkhidmatan. Ini kerana defendan-defendan hanya dikehendaki mematuhi bahagian yang berkenaan resolusi lembaga pengarah yang memperkenalkan Pakej Sumber Manusia tersebut sahaja.

[Perintah sekadarnya.]

Case(s) referred to:

Co-operative Insurance Society Ltd v. Argyll Stores (Holdings) Ltd [1998] AC 1 ***(refd)***

Gregory v. Philip Morris Ltd [1988] 80 ALR 455 ***(refd)***

Francis v. Municipal Councillors of Kuala Lumpur [1962] MLJ 407 ***(refd)***

Freeth v. Burr LR 9 CP 213 ***(foll)***

Guest, Keen, Williams Private Ltd v. PJ Sterling AIR [1959] SC 1279 ***(foll)***

Howard Smith Ltd v. Ampol Petroleum Ltd & Ors [1974] AC 821 ***(refd)***

Ngurli Ltd v. McCann [1953] 90 CLR 425 ***(refd)***

Ram Kissendas v. Satya Charan AIR [1950] PC 81 ***(refd)***

Saroj Kumar Ghosh v. Chairman, Orissa State Electricity Board AIR [1970] Ori 126 ***(foll)***

Workmen of Kettlewell Bullen & Co Ltd v. Kettlewell Bullen & Co [1964] LLJ 146 ***(refd)***

Legislation referred to:

Companies Act 1965, s. 128

Specific Relief Act 1950, s. 21(1)

For the appellants - VK Lingam (VK Lakshmi with him); M/s VK Lingam & Co

For the respondents - Romesh Abraham (Audrey Tang with him); M/s Shook Lin & Bok

[Appeal from High Court, Shah Alam; Suit No: MT3-22-524-1999]

Reported by Suresh Nathan

JUDGMENT

Gopal Sri Ram JCA:

[1] This appeal is directed against the order of the Shah Alam High Court dismissing the plaintiffs' claim against the defendants for specific relief amounting to reinstatement in office. The factual matrix from which this dispute arises lies in a narrow compass. We begin by introducing the parties in this case.

[2] The fifth defendant is a public listed company. The other defendants are members of the fifth defendant's board of directors. The plaintiffs are brothers. They were at all material times directors of the fifth defendant. The first plaintiff rose from the ranks to become a director of the fifth defendant. Initially, he was an employee of the fifth defendant's branch office at Ipoh. He

A became a director on 30 October 1966 and then was appointed as the fifth defendant's very first managing director on 18 December 1967 by a resolution of that date. He has held that post ever since. But he has never had a contract of service with the fifth defendant. Apart from being a member of the fifth
B defendant's board, the first plaintiff is its substantial shareholder. His either directly or indirectly owns almost 68 million shares of the fifth defendant. As for the second plaintiff, he joined the fifth defendant in 1967, was appointed as a member of its board on 8 October 1974 and was at all material times its executive director.
C Like the first plaintiff, he never had a contract of service with the fifth defendant. And, he too is a substantial shareholder of the fifth defendant and owns or controls almost 65 million of its shares.

[3] There are three features of the plaintiffs' respective service
D contracts with the fifth defendant that require mention. First, neither was in writing. Second, neither contained an express term imposing a retirement age for the plaintiffs. Third, there is no article in the memorandum and articles of association of the fifth defendant specifying a retirement age for either plaintiff. Neither is
E there any material from which an inference may fairly be drawn of the existence of an implied term that the plaintiffs in particular the first plaintiff, was compulsorily to retire when he reached 55 years of age. In fact the evidence of circumstances points in the opposite direction. For, when the first plaintiff reached the age of
F 55 on 5 January 1996, he was not called upon to retire. On the other hand, he simply continued in his position as the fifth defendant's managing director. There is therefore much force in the first plaintiff's argument – and this forms part of his pleaded case – that it was a term of the agreement between himself and
G the fifth defendant that the former would serve as the managing director of the latter for as long as he is willing and able to perform his duties. The second plaintiff's position is more or less the same as that of the first. In his case he had served the fifth defendant for about 30 years with no suggestion that he should
H retire as an executive director on attaining 55 years of age. He was therefore entitled to assert, as he did, that he could act as an executive director for so long as he was willing and able to do so.

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[4] The present dispute manifested itself in consequence of a decision of the board of the fifth defendant taken on 31 March 1999 resolving that all executive directors must retire on attaining 55 years of age. This decision was conveyed to the first plaintiff by a letter dated 26 April 1999 which informed him that he was required to retire as the managing director of the fifth defendant's group of companies with effect from 31 May 1999. The plaintiffs brought an action challenging the introduction of a new term into their existing contract that they should retire. In his pleaded case, the first plaintiff asserted that it was an implied term of his appointment as managing director of the fifth defendant that he would remain as managing director for as long as he was willing and able to do so. The High Court, as we have already said, dismissed the claim of both plaintiffs.

[5] A number of grounds were canvassed before us both in support of and in opposition to the appeal. We find it unnecessary to deal with all of them. The main point in the case is whether the fifth defendant by its board resolution of 31 March 1999 could require the first plaintiff to retire on the ground that he had already attained 55 years of age; an event that took place some three years earlier. We think that this issue should be resolved in the first plaintiff's favour. Our reasons are as follows.

[6] In the first place, as we have already said, it was neither an express nor an implied term of the first plaintiff's contract with the fifth defendant that he shall retire on attaining 55 years of age. In the second place, (again, as we have already observed) on the material presented to the court below it was plainly a term of the first plaintiff's contract that he shall serve as managing director for as long as he is willing and able to perform his duties. That is why he was permitted without any protest from any quarter to continue to serve as managing director even after he had attained 55 years of age. In the third place, there is material on record to reasonably support the inference that the resolution of 31 March 1999 was the product of a design by the second defendant and those members of the board aligned to him to have the plaintiffs removed as managing director and executive director respectively. Previous attempts to remove the first plaintiff had failed. Hence resort was had to this rather spurious method of getting rid of him: by purporting to retire him. So much of the resolution as was directed at retiring the plaintiffs (in particular the first plaintiff) was

A therefore tainted with bad faith evidenced by the bitter family feud between the plaintiffs and the second defendant. In short, the power to pass the resolution as to retirement of directors was a fiduciary power entrusted by the memorandum and articles of the fifth defendant to the other defendants. That power was used by
B the defendants for a collateral or improper purpose, namely, to remove the first plaintiff and was to that extent invalid. (See, *Howard Smith Ltd v. Ampol Petroleum Ltd and Others* [1974] AC 821; *Ngurli Ltd v. McCann* [1953] 90 CLR 425). In the fourth place, the resolution cannot as a matter of law have retrospective
C effect so as to compel the plaintiffs to retire. In this context, would refer to two authorities. In *Guest, Keen, Williams Private Ltd. v. P. J. Sterling* AIR [1959] SC 1279 an employer had for the first time introduced into its employment scheme a condition of service that its workmen shall retire at 55 years of age. It was
D held by the Supreme Court of India that the new condition of service could not apply to employees who had been in employment prior to the introduction of the new term. In the course of his judgment, Gajendragadkar J accepted the argument of the affected workmen that it was unfair and unreasonable to apply the new
E condition as to retirement to them. That, of course, was a case decided by the application of principles of industrial law and equity: hence the use of the phrase "unfair and unreasonable" in the judgment of the Supreme Court.

F **[7]** In *Workmen of Kettlewell Bullen & Co. Ltd v. Kettlewell Bullen & Co* [1964] LLJ 146, rules of retirement were introduced by the employer in 1947 and again in 1951. The Supreme Court of India said:

G > Our conclusion is that the rules of retirement at 55 framed in 1947 and 1951 do not apply to the prior employees of the company. It is clear that prior to 1947 there was no rule or condition of service as regards the age of retirement and workmen were allowed to continue as long as they remained fit.

H **[8]** But the common law is far stricter than principles of industrial law and equity. An attempt by a party to a contract to unilaterally introduce a new term into it is regarded as a breach of contract. This is because it amounts to "an intimation of an intention to abandon and altogether to refuse performance of the
I contract" as it stands: See, *Freeth v. Burr* LR 9 CP 213, per Lord Coleridge. And this is precisely the case before us. In our

judgment the learned judge in the court below ought to have held for the plaintiffs by making a finding that so much of the resolution of 31 March 1999 resolving that all executive directors must retire on attaining 55 years of age did not apply to the plaintiffs. We do not envisage any difficulty in the grant of an injunction restraining the defendants from implementing the resolution of 31 March 1999 insofar that it imposes the retirement age of 55 years upon the plaintiffs.

[9] There is a further question. Can the plaintiffs continue to serve as the managing director and executive director respectively of the fifth defendant? We think they can. And with no difficulty. In fact, the Human Resource package introduced by the defendants by way of the same resolution of 31 March 1999 provides the answer. This is what it says in cl. 26:

> These Terms & Conditions of Employment shall be effective 1st January 1999.
>
> For Executive Directors who were in employment before 1st January 1999, all the benefits embodied in the above Terms & Conditions of Employment are retroactive to the date of their employment in the Kian Joo Can Factory Group.
>
> Where Executive Director who is presently enjoying any benefit which is better than that in this Terms & Conditions of Employment, shall continue to enjoy such benefit as Personal-To-Holder.

[10] There you have it. The plaintiffs are executive directors who enjoyed the benefit of not having to retire at 55 years. This is a benefit which is better than that in the terms and conditions of employment which fix the retirement age at 55 years. Accordingly, this is a benefit that is to accrue to the plaintiffs on a personal to holder basis. All that needs to be done is to grant a declaration to the plaintiffs that gives effect to cl. 26.

[11] But, says Mr. Abraham for the defendants, such a declaration would amount to granting specific enforcement of a service contract which is something a Court of Equity will never decree. With respect we are unable to accept that submission. It is too wide and disregards the element of flexibility that is common to all types of specific relief. Indeed, s. 21(1) of the Specific Relief Act 1950 recognises this feature of specific enforcement. It says:

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> The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant any such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.

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[12] In *Francis v. Municipal Councillors of Kuala Lumpur* [1962] MLJ 407 Lord Morris of Borth-y-Gest stated what we think is the general policy of a Court of Equity towards the enforcement of service contracts:

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> In their Lordships' view when there has been a purported termination of a contract of service a declaration to the effect that the contract of service still subsists **will rarely be made**. This is a consequence of the general principle of law that the Courts will not grant specific performance of contracts of service. **Special circumstances will be required** before such a declaration is made and **its making will normally be in the discretion of the Court.** (emphasis added.)

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[13] In *Co-operative Insurance Society Ltd v. Argyll Stores (Holdings) Ltd* [1998] AC 1 Lord Hoffmann stated what we apprehend to

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be the true principle in words to like effect as those that fell from Lord Morris of Borth-y-Gest in Francis:

> A decree of specific performance is of course a discretionary remedy and the question for your Lordships is whether the Court of Appeal was entitled to set aside the exercise of the judge's discretion. There are well-established principles which govern the exercise of the discretion but these, like all equitable principles, are flexible and adaptable to achieve the ends of equity, which is, as Lord Selborne L.C. once remarked, to 'do more perfect and complete justice' than would be the result of leaving the parties to their remedies at common law: *Wilson v. Northampton and Banbury Junction Railway Co.* [1874] LR 9 Ch.App. 279, 284. Much therefore depends upon the facts of the particular case …

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[14] In *Gregory v. Philip Morris Ltd* [1988] 80 ALR 455 at 481-2, Jenkinson J said:

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> In *Francis v. Kuala Lumpur* (at 1417-18) the Judicial Committee referred to 'the general principle of law that the courts will not grant specific performance of contracts of service'. *This was not put as a rule of law but the Committee observed that special circumstances will be required before a court exercises its discretion to make such an order.*

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> The order sought in the present case does not relate to a particular notice of dismissal. It is designed to compel the respondent to restore its previous relationship with the appellant. The order falls into the category which is subject to the general principle referred to in Francis. We do not regard that principle as immutable. ... *We would not wish to give any endorsement to the view that there may never be an order in the nature of specific performance of a contract of employment. But the making of such an order is a matter within the discretion of the court.* (emphasis added.)

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[15] A case analogous to the present instance is *Ram Kissendas v. Satya Charan* AIR [1950] PC 81. There, a resolution was passed purporting to remove certain directors from office. The resolution was not in accordance with the constitution and articles of the company. The Privy Council granted a declaration that the removal of the directors was ineffective. Lord Greene who delivered the advice of the board said:

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> The next point also lacks substance. It was that to affirm the continuance in force of the managing agents' appointment amounted to specific enforcement of a contract of personal service and was a violation of section 21(b) Specific Relief Act 1877. The effect of the decree appealed against is not, however, of that nature. It merely prevents dismissal of the managing agents or termination of their appointment at the instance of a majority in violation of articles of association of the company which the minority are entitled to have observed. As between the company and the managing agents it certainly has not the effect of enforcing a contract of personal service.

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[16] So too here. An injunction restraining the implementation of the resolution of 31 March 1999 imposing a retirement age of 55 years upon the plaintiffs is not a decree of specific enforcement. It merely prevents so much of that resolution which requires executive directors to retire upon attaining 55 years of age from being applied to the plaintiffs. You must recall that this is not a case of termination or removal from office under s. 128 of the Companies Act 1965. This is a case in which a retirement age is being imposed by way of a board resolution. There is a world of difference between retirement from office and termination from employment.

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[17] Thus in *Saroj Kumar Ghosh v. Chairman, Orissa State Electricity Board* AIR [1970] Ori 126, KN Misra J, when delivering the judgment of the court said:

> Termination and superannuation cannot be equated. The dictionary meanings of the two also do not indicate that there is any similarity in the two processes. The meaning of 'superannuation' as in the dictionary is 'to cause to retire from service on a pension, to pension off, to become too old for a pension, to reach an age at which one retires from an office', and the meaning of 'termination' is 'cessation, closure, conclusion, the act of bringing a matter to an end'. Superannuation seems to us to be an event which comes more or less in an automatic process. An age is fixed on the reaching of which the holder of an office is required to go out of office. There is no violation in the act. With the lapse of time the event automatically comes. Both the parties, that is, the employer and the employee have notice of the matter long before and it is an event which cannot be arrested by them if the rule is to be followed. On the other hand, termination is a positive act by which one party even against the desire of the other can bring about the end to an employment. In these circumstances the two processes are essentially different and there is hardly any room to equate one with the other.

[18] At the risk of repetition, we would emphasise that what happened here was the unilateral imposition of a retirement age of 55 years by way of a board resolution after the first plaintiff had already crossed that age about three years earlier. The question is this: can that resolution be made to apply to the plaintiffs? And, as we have already said, it cannot. So it is simply a question of disapplying the resolution to the plaintiffs.

[19] Likewise, a declaration that in accordance with cl. 26 of the Human Resource Package the plaintiffs are entitled to continue as managing director and executive director respectively without a retirement age and are entitled to continue to enjoy the said benefit on a personal to holder basis until they attain 70 years of age does not amount to the specific enforcement of a service contract. This is because we are merely requiring the defendants to adhere to that part of the board resolution that introduced the Human Resource Package. We would impose the age limit of 70 years as this is a requirement of the Companies Act.

[20] For the reasons already given, the appeal was allowed and the orders of the High Court were set aside. Secondly, an injunction was granted restraining the implementation of so much of the resolution of the board of directors of the fifth defendant dated 31 March 1999 that imposed the retirement age of 55 years upon the plaintiffs. We also granted a declaration that in accordance with cl. 26 of the Human Resource Package that the plaintiffs are entitled to continue as managing director and executive director respectively without a retirement age and are entitled to continue to enjoy the said benefit on a personal to holder basis until they attain 70 years of age. The deposit in court was ordered to be refunded to the plaintiffs and the defendants were ordered to bear the costs of this appeal as well as those incurred in the court below.